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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 985

ROBERT F. BRUCE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RALPH J. TEMPLE
Suite 501
1424 16th Street, N. W.
Washington, D. C.
Attorney for Petitioner

Of Counsel:
SAREL M. KANDELL
WM. WARFIELD ROSS
National Capital Area
Civil Liberties Defense
and Education Fund
LAWRENCE SPEISER
MELVIN L. WULF
American Civil Liberties Union

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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No.

ROBERT F. BRUCE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Robert F. Bruce prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above entitled case on August 14, 1967.

CITATIONS TO OPINIONS BELOW

No opinions have been issued at any stage of this criminal proceeding, either by the United States Court of Appeals for the District of Columbia Circuit in affirming petitioner's conviction (R. 4) and in denying rehearing en banc (R. 6), or by the United States District Court for the District of Columbia in adjudicating petitioner guilty (T.R. 13), and in

denying his motion for judgment of acquittal notwithstanding the verdict (T.R. 15).*

JURISDICTION

The judgment of the Court of Appeals was entered on August 14, 1967 (R. 4). A timely petition for rehearing en banc was denied on November 3, 1967 (R. 6). On December 4, 1967, Mr. Chief Justice Warren issued an order extending the time within which to file this petition for a writ of certiorari to and including January 2, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (a).

QUESTIONS PRESENTED

I

A. Whether petitioner's Sixth Amendment right to counsel was violated when he was forced to stand trial with court-appointed counsel, despite his showing that counsel of his choice was willing to represent him, and despite his request for a reasonable continuance for this purpose.

B. Whether the Fifth and Sixth Amendments are violated by the denial of continuances to indigent defendants to permit the appearance of counsel of their choice where it is demonstrable that such continuances would be granted in similar circumstances to persons with means.

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*"R." designates citations to the record of the Court of Appeals; "T.R." designates citations to the trial court record; and "Supp. T.R." designates citations to the supplemental trial court record.

II

Whether petitioner's Fifth Amendment right to due process was violated by admission into evidence of a Nazi flag petitioner had displayed and of Nazi slogans he had shouted in the House of Representatives, where the only disputed issue before the jury was whether petitioner assaulted the police officer who subsequently arrested him.

CONSTITUTIONAL PROVISIONS INVOLVED

UNITED STATES CONSTITUTION

Amendment VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On April 19, 1966, petitioner was tried and convicted in the United States District Court for the District of Columbia on a felony charge of assaulting a police officer in violation of Title 22, Section 505 of the District of Columbia Code. A prison sentence was imposed of not less than four months and no more than one year and a day (T.R. 13). On June 30, 1966, petitioner was released on bond pending appeal and remains free at the time of the filing of this petition.

Petitioner, who was indigent (T.R. 29), was forced to trial with an attorney appointed by the trial court, over petitioner's request that he be granted a 60-day continuance so that the counsel of his choice, or such counsel's designee, could be present in court to represent petitioner (Supp. T.R. 3-4). The trial court denied petitioner's request for a continuance despite the following circumstances:

(1) Petitioner presented to the trial court a letter signed by his chosen attorney stating that the 60-day continuance would permit time for the attorney or his designee to prepare the defense and appear in court to represent petitioner (R. 3; Supp. T.R. 3-4);

(2) There had been no prior continuances, and the case had come to trial with a speed unusual in the District court;

(3) The Government did not object to the requested continuance;

(4) There was no indication and no suggestion that the indigent petitioner, who had been in prison from the time of his arrest seven months earlier, had been dilatory or at fault in any way in his efforts to contact and arrange for representation by the attorney of his choice.

The charge and conviction in this case were based on events which occurred on September 24, 1965. On that day, petitioner, then a member of the American Nazi Party (T.R. 29), caused a disturbance in the spectators' gallery of the House of Representatives of the United States by repeatedly shouting "Long live Rockwell", "Down with Home

Rule", and "Home Rule is racial suicide", and by throwing "racial" leaflets and a Nazi swastika flag to the Floor of the House. He was immediately arrested on charges of disorderly conduct. It was also charged that during this arrest he assaulted a police officer (Supp. T.R. 13-16, 27, 33, 43; Govt. Exhibit 1).

Three hours after his arrest, petitioner was brought before the District of Columbia Court of General Sessions on the charges of disorderly conduct and the felony charge of assaulting a police officer (T.R. 32-33).[1] After several continuances, these matters came before the General Sessions court for disposition on November 30, 1965 (T.R. 33).[2] On November 30, 1965, petitioner pleaded guilty to two charges of disorderly conduct arising out of his actions in the House of Representatives on September 24, 1965, and received two maximum 90 day sentences, to run consecutively (R. 5(3); Supp. T.R. 43-44). That afternoon, following a preliminary hearing, petitioner was held under $1,000.00 bond for grand jury action on the charge of assaulting a police officer (T.R. 33).

Petitioner was indicted on the assault charge on March 7, 1966 (T.R. 27), and arraigned on March 18, 1966, when he

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[1]The District of Columbia Court of General Sessions is the "municipal" or "police" court of the District of Columbia. It had jurisdiction over the disorderly conduct charges, D.C. Code § 11-963. The General Sessions court was also acting as committing magistrate on the felony charge of assaulting a police officer. D.C. Code § 11-963 (c); District of Columbia Court of General Sessions Criminal Rule 13.

[2]Petitioner remained in custody, unable to raise bond on the charges. From October 15, 1965 to November 10, 1965, he was committed by the court to the District of Columbia General Hospital for mental observation (T.R. 33). The psychiatric report stated that petitioner was suffering from "paranoid traits", but concluded that he was of sound mind and competent to stand trial (T.R. 30).

pleaded not guilty (T.R. 25). At that time the District court appointed counsel to represent petitioner, and scheduled the trial for April 19, 1966, approximately one month later (T.R. 6, 25).[3]

Petitioner, although indigent and in prison from arrest to trial, managed to contact and request the representation of Charles A. Gould, Jr., an attorney in Miami, Florida.[4] Mr. Gould wrote to petitioner on April 8, 1966, agreeing either to arrange for an attorney to represent petitioner or to represent petitioner himself. Gould's letter instructed petitioner to ask for a 60 day continuance "so that there will be plenty of time to prepare your defense", and advised petitioner to show the letter to the court (R. 3).[5]

On the morning of April 19, 1966, the case came before the Assignments Judge in the District court. Petitioner's court appointed counsel did not move for a continuance at that time and the case was assigned to one of the judges sitting on criminal trials (T.R. 17). The case was called before the trial judge at 1:45 p.m. that afternoon, and court-appointed defense counsel announced that the defense was "ready" (Supp. T.R. 1, 3).

At that time, petitioner attempted to address the court, but was ordered instead to "Send your counsel up". (Supp. T.R. 3) The court-appointed defense counsel approached the bench and showed the court the letter from petitioner's

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[3]The District court appointed the same attorney who had been appointed by the General Sessions court on the day petitioner was arrested to represent petitioner at his preliminary hearing. (T.R. 33)

[4]Inmates of the District of Columbia jail are allowed visits twice a week and indigents are issued no more than three postage stamps a week. District of Columbia Department of Corrections, D.C. Jail Bulletins 3 and 11. Inmates of the D. C. Jail are given no assistance in resolving "personal problems," and sometimes experience difficulties in communicating by mail. Report of the President's Commission on Crime in the District of Columbia, 422 (1966).

[5]The letter is reprinted in its entirety in Appendix A of this petition.

chosen attorney urging a continuance. The court, without explanation, stated that no continuance would be granted and ordered the trial to proceed.[6]

The trial, including voir dire, lasted about 1½ hours (Supp. T.R. 53). No witnesses other than petitioner were presented for the defense. The jury returned with a verdict of guilty in 17 minutes (T.R. 16).

REASONS FOR GRANTING THE WRIT

I

The Supreme Court has never decided:

(1) Whether an indigent accused has a right to be represented by his own counsel rather than a court-appointed attorney;

(2) Whether an indigent must be permitted the same opportunity as a person with means for his chosen counsel to appear; or

(3) Whether, under any circumstances, the courts should give any heed to the indigent's choice in assigning him counsel.

The Court has stressed that the Sixth Amendment right to counsel includes the right to counsel of one's choice and a reasonable opportunity to select such counsel. *Reynolds v. Cochran*, 365 U.S. 525, 530-31 (1961); *Chandler v. Fretag*, 348 U.S. 3, 9-10 (1954); *Crooker v. California*, 357 U.S. 433, 439 (1958); *Powell v. Alabama*, 287 U.S. 45, 69 (1932). But none of these cases dealt with the above questions.

In answering these questions, inconsistent approaches have developed among the decisions of the court below, the decisions of the courts of appeals of other circuits, and the decisions of state courts. Guiding standards are needed inasmuch

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[6]The colloquy, appearing at Supp. T.R. 3-4, is reprinted in its entirety in Appendix B of this petition.

as attorneys must be appointed for over 60 per cent of the almost 350,000 felony defendants charged in state and federal courts each year,[7] and indigents frequently desire attorneys other than those assigned to them.[8] The importance of the right to a reasonable latitude for choice in the selection of counsel rests on the intimacy of the attorney-client relationship, and on the fact that there is no practical remedy for a mediocre or poor defense performance.[9]

The short shrift given to petitioner's desire to be represented by Mr. Gould, or an attorney chosen by Mr. Gould, can be supported only if the indigent accused is not entitled to choose his attorney or is not entitled to a continuance to permit his chosen attorney to appear in the same circumstances in which a person with means would be granted a continuance. Petitioner was not asking the court to appoint substitute counsel; he was asking for the same opportunity to permit his chosen counsel to appear that would most certainly have been allowed a person with means.

Petitioner presented to the court a letter from an attorney in whom he apparently had confidence stating unequivocally that the attorney or someone chosen by him would represent petitioner. Disregarding the importance of petitioner's request for a reasonable continuance to permit such attorney to appear, the trial court forced petitioner to trial with court assigned counsel at a speed that was unusual for

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[7]The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts, pp. 55, 56 (1967).

[8]See, e.g., 2 Silverstein, Defense of the Poor, 134 (American Bar Foundation, 1965); National Conference on Bail and Criminal Justice, Proceedings and Report, 120 (Department of Justice, 1964); Note, Effective Assistance of Counsel for the Indigent Defendant, 78 Harv. L. Rev. 1434, 1438, 1445 (1965).

[9]See Note, Effective Assistance of Counsel for the Indigent Defendant, 78 Harv. L. Rev. 1434, 1438, 1442-43 (1965); Blumberg, Covert Contingencies in the Right to the Assistance of Counsel, 20 Vand. L. Rev. 581, 584-88, 604 (1967).

the United States District Court for the District of Columbia. If the requested continuance had been granted, as almost all first, unopposed continuances are in the district court, petitioner's case would still have come to trial faster than most cases in that court.[10]

The court made no inquiry to determine why petitioner desired to be represented by Mr. Gould rather than his appointed attorney, or whether petitioner had been diligent in contacting and arranging for representation by Mr. Gould. In view of the restrictions on communicating from prison, and in view of the unpopularity of petitioner's case,[11] it is clear that petitioner was diligent in obtaining his chosen counsel as quickly as he did.

Among most courts that have considered the question, there is a strong inclination to treat the matter of counsel for the accused as one of largesse, and to assert that in no circumstances may the indigent exercise any choice in the selection of his counsel. That notion may account in the instant case for the trial court's casual rejection of petitioner's request for time to permit his chosen attorney to appear. Another illustration of this approach is seen in a capital case now pending in the Court of Appeals of the State of New

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[10]The trial took place approximately one month after arraignment and seven months after arrest. The lapse of time for over 80% of the cases in the district court during that period was 4 months from arraignment to trial, see Report of the President's Commission on Crime in the District of Columbia, 257 (1966), and approximately one year from arrest to trial. Senate Report No. 729, p. 6, United States Senate, Committee on Appropriations, Subcommittee on H.R. 8569, 90th Cong., 1st Sess., November 7, 1967.

[11]*Cf. United States v. Mitchell*, 354 F.2d 767, 769 (2 Cir. 1966), in which the court reversed a conviction where defendant was given a continuance which was inadequate to select counsel in view of the unpopularity of his case.

York, *People v. Baker*.[12] In that case, the trial court refused to appoint a named attorney requested by the indigent accused even though the attorney appeared in court and requested the appointment. The court ruled that the choice of an attorney to be appointed for an indigent was the exclusive prerogative of the court, and added (Part XXX, Transcript 13-14):

> "I want to state now . . . until the United States Supreme Court tells me differently by its decisions, I am going to stick [by] what my theory is with respect to . . . [appointment of counsel]."

Similarly, in *United States ex rel. Mitchell v. Thompson*, 56 F. Supp. 683, 688-89 (S.D. N.Y. 1944), the court stated:

> "I have always believed the law to be that the choice of counsel for indigent persons accused of crime was the court's and not the defendant's . . . It has been my understanding that the courts need have no concern with the private predilections of the defendant for a lawyer of a specified color . . . or sex or age or political affiliation; and that the defendant may not name the lawyer whom the court must appoint."

Similar expressions are found in other federal and state decisions. See, e.g., *Tibbett v. Hand*, 294 F.2d 68, 73 (10 Cir. 1961); *United States v. Davis*, 365 F.2d 251, 254 (9 Cir. 1966); *Murray v. Director of Patuxent Institution*, 228 Md. 658, 179 A.2d 878, 879 (1962); *People v. Woods*, 26 Ill. 2d 557, 188 N.E.2d 1, 3 (1963); *In re Carvelo*, 44 Haw. 31, 352 P.2d 616, 628 (1959); *People v. Grimaldi*, 24 Misc. 2d 43, 203 N.Y.S.2d 397, 398 (1960), *aff'd*, 13 App. Div. 2d 508, 215 N.Y.S.2d 465 (1961).

In *Brown v. United States*, 105 U.S. App. D.C. 77, 264 F.2d 363, *cert. denied*, 360 U.S. 911 (1959), the United States Court of Appeals for the District of Columbia Circuit,

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[12] Supreme Court of the State of New York, County of New York, Indictment No. 195-1964, Part XXX, June 3, 1964, *convicted*, Part XXXVI, September, 1965, *affirmed*, App. Div. No. 11812, *appeal pending*, Court of Appeals of the State of New York, No. ____.

sitting *en banc*, divided sharply over similar issues.[13] A majority of five judges held that the trial court had not violated the defendant's rights even though (as in the instant case) it gave him no opportunity to explain and made no inquiry as to his desire to discharge or change his attorney. The majority opinion suggested that the court need not make any inquiry (264 F.2d at 366), but Judge Burger, in a concurring opinion, stated that such an inquiry must be made (264 F.2d at 367, 369). The four dissenting judges, on the other hand, emphasized the indigent's right to some choice regarding his defense counsel, and placed the onus of justifying the limitation of that choice on the trial court (264 F.2d at 369, 370):

> "[W]e do not question the power of the District Court to conduct its proceedings free of obstruction and delaying tactics. But it must apply the same rules to indigents as to persons of means: it cannot force an indigent into a trial with repudiated counsel simply because he is an indigent and has had counsel appointed for him by the court."

In *Lee v. United States*, 98 U.S. App. D.C. 272, 235 F.2d 219 (1956), a panel of three of the judges, who subsequently dissented in the *Brown* case, *supra*, reversed a conviction where defendant was not permitted a sufficient continuance to obtain counsel of his choice. The court held, consistent with the dissenting opinion in *Brown*, that the record must show fault or intent to delay on the part of defendant before he can be forced to trial with an undesired attorney appointed by the court. In *Cleveland v. United States*, 116 U.S. App. D.C. 188, 322 F.2d 401, *cert. denied*, 375 U.S. 884 (1963), a panel including two of the dissenters in the *Brown* case, in affirming the conviction where the record showed fault and delay by the defendant, recognized that (322 F.2d at 402):

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[13]The record of the case, and the opinions, leave unclear whether the defendant in the *Brown* case wanted to proceed pro se or wanted substitute counsel appointed.

> "[T]he right to counsel is one of the important basic rights, and the right to choose one's own counsel is a vital element in that basic right."
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> * * *
>
> "[W]hen the constitutional right is pitted against the inconvenience of a delay a substantial presumption must be indulged in favor of the former."

Cf. United States v. Johnston, 318 F.2d 288 (6 Cir. 1963) (conviction reversed where reasonable continuance denied for appearance of retained counsel; no prejudice need be shown); *Ingle v. Fitzharris*, 375 F.2d 398 (9 Cir. 1967) (conviction reversed where continuance denied and record failed to show fault on defendant for discharging attorney); *Gomez v. Heard*, 218 F. Supp. 228 (S.D. Tex. 1962), *aff'd sub nom. Heard v. Gomez*, 321 F.2d 88 (5 Cir. 1963) (habeas corpus granted where state court denied the first requested continuance to permit retained attorney to appear).

Under the English system, the indigent accused is permitted to exercise some choice in the selection of his counsel. See, Lord Parker, *The Development of Legal Aid in England Since 1949*, 48 A.B.A.J. 1029-30, 1032 (1962). Several commentators indicate that reasonable allowance for the indigent's choice regarding his counsel is desirable. See, e.g., Kamisar, *The Right to Counsel in Minnesota: Some Field Findings and Legal Policy Observations*, 48 Minn. L. Rev. 1, 106-07 (1963). See, also, *American Bar Association Project on Minimum Standards for Criminal Justice, Providing Defense Services*, 50-51 (1967); Frankel, *Experiments in Serving the Indigent*, 51 A.B.A.J. 460, 463 (1965).

However, in this country, most courts do not afford indigents any choice in the matter of defense counsel. 1 Silverstein, *Defense of the Poor*, 19, 37 (1965). Indeed, a number of federal jurisdictions have adopted rules under the Criminal Justice Act, 18 U.S.C. §§ 3006, et seq., which expressly prohibit the indigent from having any degree of choice in the assignment of his counsel. *ABA Project on Minimum Standards for Criminal Justice, supra*, at 29-30.

This Court should render guiding standards, particularly respecting the federal courts where the exercise of supervisory powers is appropriate. Complete equality in the administration of justice may be unattainable, but the disparities can be minimized by standards which permit the indigent accused the same latitude in choosing his counsel as one with means.[14] Careless and dilatory tactics of indigents can be regulated just as they are respecting rich defendants. See, *United States ex rel. Davis v. McMann*, 252 F. Supp. 539 (N.D. N.Y. 1966); dissenting opinion in *Brown v. United States, supra*, 264 F.2d at 369, 370 (D.C. Cir. 1959) (The courts "must apply the same rules to indigents as to persons with means . . ."). *Cf. Griffiths v. United States*, 172 F. Supp. 691 (Ct. Cl.), *cert. denied*, 361 U.S. 865 (1959), in which the court ruled that the circumstances justified forcing a monied party to suit with court-assigned counsel when his retained counsel could not be present.

Some latitude for the indigent accused's preferences in the assignment of his counsel is essential. Not every indigent can be defended by Clarence Darrow, but if Darrow is in court and joins the indigent in asking for the assignment, the indigent should have him. Similarly, in the instant case, if petitioner had not been indigent it is clear he would have been granted this first and unopposed continuance to permit the appearance of his chosen attorney. Petitioner should not have been denied that right simply because he was indigent.

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[14] See, Symposium: Has the Court Left the Attorney General Behind? The Bazelon-Katzenbach Letters on Poverty, Equality, and the Administration of Criminal Justice, 54 Ky. L. J. 464, 467-69 (1966); Attorney General's Committee, Report on Poverty and the Administration of Federal Criminal Justice, 9 (1963).

II

The court below affirmed petitioner's conviction despite the admission into evidence of a Nazi swastika flag and testimony concerning the shouting of Nazi slogans by petitioner just before his arrest. The Nazi flag and slogans were immaterial to the only contested issue in the case inasmuch as petitioner conceded that the police officer was lawfully placing him under arrest at the time of the alleged assault (Supp. T.R. 9).[15] The flags and slogans must have had a prejudicial effect on the jury.[16]

The Government conceded, and the trial court recognized, that Nazi pamphlets also thrown by petitioner just before his arrest were "very racial" and "very violent about Negro rights," and these were not introduced (Supp. T.R. 16). Nevertheless, the Government offered and the court admitted the flag (*Ibid.*). Both the flag and the shouting of the Nazi slogans were emphasized throughout the Government's testimony (Supp. T.R. 14, 15-16, 17-18, 27-28, 33), and in the prosecutor's opening and closing statements to the jury (Supp. T.R. 8, 47-49).

The admission into evidence of this inflammatory evidence having no bearing on the only contested issue, i.e., whether petitioner assaulted the arresting officer, deprived petitioner of his Fifth Amendment right to a fair and impartial trial. See *Marshall v. United States*, 360 U.S. 310, 312-13 (1959); *Michelson v. United States*, 335 U.S. 469, 475-76 (1948); *Boyd v. United States*, 142 U.S. 450, 458 (1892). At the very least, the admission of such evidence in a federal prosecution calls for an exercise of the Court's supervisory

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[15] In fact, the trial court, for purposes of excluding certain evidence offered by the defense, ruled that the disorderly conduct preceding the arrest was irrelevant to the case (Supp. T.R. 38-40).

[16] The flag (Government Exhibit 1), which is several square feet in size, is on deposit with the Clerk of the Court as part of the record of this case.

powers. *Cf.* Justice Stewart's concurring opinion in *Spencer v. Texas*, 385 U.S. 554, 569 (1967).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

RALPH J. TEMPLE
Suite 501
1424 16th Street, N. W.
Washington, D. C.
Attorney for Petitioner

Of Counsel:

SAREL M. KANDELL
WM. WARFIELD ROSS
National Capital Area
Civil Liberties Defense
and Education Fund

LAWRENCE SPEISER
MELVIN L. WULF
American Civil Liberties Union

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